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No. 03-622

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Acting Solicitor General's Own "*Skidmore* Deference" Standard Requires Reversal In This Case 1

II. The Acting Solicitor General Does Not Adequately Address The Conflicts Identified By The Petition 6

III. The Eleventh Circuit's "Finality" Rule Violates Established Due Process Principles 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694 (5th Cir. 1999).....5

Bunkley v. Florida, 123 S. Ct. 2020 (2003) (per curiam).....10

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....6, 7

Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825).....6, 8

Fiore v. White, 531 U.S. 225 (2001) (per curiam).....10

In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992).....7

Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).....9

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003).....2, 3

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941).....7

Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).....7, 8

Riggs National Corp. v. Commissioner, 163 F.3d 1363 (D.C. Cir. 1999).....7, 8

Skidmore v. Swift & Co., 323 U.S. 134 (1944).....2

Société Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).....8

United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926).....4

United States v. King, 44 U.S. (3 How.) 773 (1845).....4

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990).....8

Court Documents

Petition For A Writ Of Certiorari, *United States v. Mead Corp.*, No. 99-1434 9

Reply Brief For The United States, *United States v. Mead Corp.*, No. 99-1434 9

REPLY BRIEF FOR PETITIONER

The Acting Solicitor General now *concedes* that federal courts generally should defer to foreign governments on the meaning of their own laws, but he proffers the weakest rule he can muster ("*Skidmore*" deference) as the appropriate standard, and he implausibly avers that the Eleventh Circuit (which never adverted to *any* deference rule) somehow correctly applied it. The Acting SG's late-blooming concession that some kind of deference is required cannot avoid plenary review, because other circuits follow far more robust deference rules than what he now proposes: the D.C. and Ninth Circuits would hold that the act-of-state doctrine *requires* acceptance of the Republic of Honduras's views in this case, and the Seventh Circuit would hold that it is "unacceptable" to grant the Republic less deference than administrative agencies receive under *Chevron*, a proposition that the Acting SG expressly disputes. The Acting SG's eleventh-hour embrace of a deference rule, however, does make clear that this case should be remanded even if the Court is not persuaded that it is suitable for plenary review (whether on the foreign-law or due process questions), because the opinion below clearly flunks even the Acting SG's own standard.

I. The Acting Solicitor General's Own "*Skidmore* Deference" Standard Requires Reversal In This Case

1. The court of appeals filed two opinions in this case. The first opinion rejected every representation about Honduran law that the Republic, through its embassy, presented to the court; the opinion capped its analysis with the proposition that it was up to the U.S. prosecutors to decide who speaks for Honduras, since the "political question" doctrine forbade second-guessing the "Executive Branch's" decision to reject Honduras's official position. Pet. App. 90a-91a. The second opinion, issued after a rehearing petition pointed out that courts may not constitutionally "defer" to the prosecution on an element of a criminal offense, was in all respects *identical*

to the first, except that the court deleted the two capstone paragraphs that expressly deferred to the prosecutors. That deletion leaves, as the sole reason for the court's high-handed treatment of the Republic, the proposition that district courts' conclusions on foreign law should be viewed as "final"—lest individuals with "means and connections" (*id.* at 23a-24a) persuade presumptively venal foreign governments to shade the law in their favor.

The Acting SG has now imagined yet a third Eleventh Circuit opinion. In the Acting SG's fictional version, the Eleventh Circuit never embraced a rule of "finality" that freezes foreign law at the trial level in order to guard against the presumed corruption of foreign governments; that aspect of the court's opinion (or the separate circuit conflict it creates) is never even *mentioned* in the brief in opposition. According to the Acting SG (Opp. 16-18), the Eleventh Circuit actually recognized its legal duty to "defer" to Honduras's official views, and in fact applied a form of "*Skidmore*" deference (*see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) that he says is in line with the Second Circuit's rule that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003). The Acting SG asserts that the Eleventh Circuit merely declined to credit the Republic's views under that "measured deference" standard (Opp. 16-17) based on "determinations" purportedly unique to this case.[1]

Those contentions are, if nothing else, audacious. The Eleventh Circuit *nowhere* mentioned the rule that courts generally must defer to foreign governments on questions of foreign law, much less did it cite *Skidmore*, *Karaha Bodas*, or

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[1] *E.g.*, Opp. 7 n.4 (court "determined" that the prosecution's witness was "the 'highest-ranking legal official'" in a relevant Honduran agency); *see also, e.g.*, *id.* at 19 (Republic's statements "untrue").

any other decision from *any* court addressing *any* deference rule, foreign or domestic. Moreover, every "determination" on which the government now relies was part of the court's original opinion and thus necessarily was made in aid of the court's (now abandoned) notion that it was bound by the "Executive Branch's decision not to accept" the views of the Republic. To do otherwise, the court had reasoned, would violate the political-question doctrine by "plac[ing] this Court in conflict with the Executive Branch with respect to the amount of deference due a foreign government official's position." Pet. App. 91a. For the Acting SG now to say that the same "determinations" somehow demonstrate that the Eleventh Circuit *did* defer to the Republic's views is astounding.[2]

2. The Acting SG's "*Skidmore* deference" standard is not only a recent tactical invention, but also a fruitless one, because the Eleventh Circuit's decision plainly flunks even that standard. Not only is the opinion bereft of any evidence that the court believed it was applying any *Skidmore* test (or giving "deference" to anyone but the prosecutors), its analysis in fact includes *a rule of law* (or "finality" principle) that seeks to guard against corruption by *rejecting* deference and holding that foreign governments can never change their initial views after those views are presented to a federal trial court. The Acting SG omits from his contrived *Skidmore* analysis any

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[2] Not surprisingly, key "determinations" on which the government now relies to assert that the Eleventh Circuit properly deferred to the Embassy's views turn out, upon inspection, to demonstrate the precise opposite: that court's uncritical acceptance of the prosecutors' claims. As the Republic has pointed out, the Eleventh Circuit's purported "determination" that the prosecution's star witness was the "highest ranking legal official" in the Ministry of Agriculture—which the Acting SG trumpets before this Court—was based solely on a federal prosecutor's naked *assertion* of that purported fact. *See* Br. for Honduras 16 n.17. The Republic's brief also explains (*id.* at 6 n.4) why the government is wrong to assert that extra-record materials further demonstrate that the Republic treats as valid resolutions not signed by the President. Opp. 11 n.5.

mention of that part of the court's holding, which cannot conceivably be supported under any proper *Skidmore* analysis, since this Court has long insisted that foreign governments, like domestic administrative agencies, are entitled to a presumption of regularity. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (public officers); *United States v. King*, 44 U.S. (3 How.) 773, 785-86 (1845) (foreign governments). Indeed, as the petition pointed out (Pet. 25-27), that aspect of the Eleventh Circuit's analysis gives rise to its own circuit conflict—one that the Acting SG, tellingly, does not even bother to address.

3. More fundamentally, the Acting SG's *Skidmore* analysis proceeds from the unarticulated premise that the Executive Branch can unilaterally decide who has legal authority to speak on behalf of foreign governments on questions of foreign law—a premise that even the Eleventh Circuit abandoned on rehearing. Thus, the Acting SG asserts that the prosecutors relied on the U.S. State Department and the U.S. Embassy in Honduras "in determining which Honduran officials to contact in order to obtain authoritative advice" (Opp. 4-5 n.3), though both foreign-policy organs somehow managed to miss that Honduras is a civil-law country whose Constitution names the Congress as the highest interpretive authority and expressly names the attorney general as the sole "legal representative" of the Nation. The Acting SG then devotes the great bulk of his brief to chronicling and defending the contacts, during the investigation, with the mid-level Honduran officials identified by the U.S. Embassy. *Id.* at 4-10, 18-19.[3] He goes so far as to refer to the views of those

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[3] That emphasis, which overwhelms by far any discussion of certiorari criteria in opposition, is misplaced. The issue is not whether these officials were appropriate initial points of contact for American agents investigating foreign law, nor is it even whether some such officials could properly be qualified as run-of-the-mine expert witnesses on Honduran law. Rather, the issues are whether those officials spoke on behalf of Honduras and whether the court of appeals was "free to follow" the inter-

lower-level officials—including views informally communicated *out of court* to prosecution agents—as "official representations" and "authoritative representations." *Id.* at 23, 24.

As other circuits have recognized, however, the question of who speaks authoritatively for a foreign country on the meaning and scope of that country's law is *itself* a question of *foreign* law governed by foreign-law deference principles. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (examining whether Mexican agency was empowered to interpret, not just enforce, certain laws, and denying deference because the Republic of Mexico did not endorse the proffered interpretation of a mere "enforcement" agency). Because of its initial assumption that our Executive's views are controlling, the Eleventh Circuit never actually examined that threshold question on its merits.

While the Acting SG repeatedly attempts to elide that fundamental problem, those attempts are transparently fallacious: The essence of the government's position is that the Republic's official views are not entitled to deference because they "differ[] dramatically from *past Honduran representations*." Opp. 17 (emphasis added). The word choice reveals the elision: To be sure, the prosecution presented the views of selected *Hondurans* who were mid-level government "officials." But as a matter of Honduran law (as that country's attorney general has explained, without contradiction, time and again), none of those assertions can purport to be the official views *of Honduras*. Even in this Court, the Acting SG offers no basis for concluding that the views of the prosecution's witnesses

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pretations of a subordinate official once her superior had rejected those views and issued a contrary interpretation that, *under Honduran law*, is indisputably binding. Remarkably, the Acting SG never so much as discusses petitioner's *successful* civil rights complaint, which resulted in the Minister of Agriculture's official repudiation of the views expressed by the prosecution's witness, his subordinate—*after* all the meetings that the brief in opposition so painstakingly describes.

are "authoritative" under Honduran law, and none is possible: As the Republic's brief explains, *Honduras* has not changed its position, because *two* different Honduran attorneys general, in successive Honduran administrations from different political parties, supported petitioner's position—both before the trial court *and* on appeal—and it cannot reasonably be disputed that the Attorney General of Honduras is the country's sole "legal representative." Br. for Honduras 15-18.

In sum, the Eleventh Circuit's analysis—and in particular its "corruption/finality" rule and its refusal to accord *any* deference to Honduras—conflicts even with the deference formulation adopted by the Second Circuit, a standard that the Acting SG now endorses. For that reason, this case should, at a minimum, be summarily remanded to the court of appeals.

II. The Acting Solicitor General Does Not Adequately Address The Conflicts Identified By The Petition

As the petition demonstrated, the courts of appeals were divided on their *approaches* to the foreign-deference question even before the court below took an even more dramatic departure by according *no* deference. Pet. 16-22. The Ninth and D.C. Circuits, for example, accord *categorical* deference based on the act-of-state doctrine, and the Federal Circuit would follow a similar categorical approach based on this Court's decision in *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825). The Seventh Circuit's deference rule, by contrast, is based on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). Thus, even if the Acting SG were correct in asserting that the Second and Fifth Circuits follow a form of *Skidmore* deference, and in claiming (insupportably) that the court below invoked and correctly applied such a rule, this Court's review would still be needed to instruct lower courts on the correct analytical approach to these important and recurring questions.

1. The Seventh Circuit expressly relied on *Chevron* to hold that a foreign sovereign's views are entitled to deference

so "substantial" as to overcome contrary testimony by legal "expert[s] of the highest skill and repute." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (per curiam). Indeed, any lower level of deference, in that court's view, is "unacceptable." *Id.* This deference rule is significantly more robust than the *Skidmore* variant proposed by the Acting SG, which essentially treats foreign officials—whether or not authorized to speak for the sovereign—as nothing more than persons likely to be "expert" in foreign law. Opp. 17. The Acting SG expressly disputes that *Chevron* informs the deference due foreign sovereigns (*id.* at 18 n.10), but that disagreement merely confirms the need for plenary review.[4]

2. The Acting SG also has not explained why plenary review is inappropriate despite the *categorical* deference rule followed by the Ninth and D.C. Circuits in reliance on the act-of-state doctrine. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 & n.7 (9th Cir. 1992); *Riggs Nat'l Corp. v. Comm'r* ("*Riggs I*"), 163 F.3d 1363, 1367-68 (D.C. Cir. 1999). The Acting SG asserts that *Richmark*'s analysis was "plainly mistaken" (Opp. 21-22), but a respondent's disagreement with conflicting authority is a reason *for* plenary review, rather than a basis for denying certiorari.[5] As for

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[4] The Acting SG disputes the *Chevron* analogy on the ground that federal agencies' lawmaking authority is a product of express congressional delegation, and because courts have "the responsibility to determine, de novo, the content of foreign law." Opp. 18 n.10. Of course, federal courts review *domestic* questions of law de novo as well, and that has never been thought inconsistent with their duty to defer to federal agencies on such questions under *Chevron*. And by incorporating state and foreign law into the Lacey Act, Congress has, if anything, left the lawmaking authority in the hands of the state or foreign government whose law is borrowed, entitling that government to deference. *Cf. Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) ("[T]he proper function of the Delaware federal court [applying Delaware law] is to ascertain what the state law is, not what it should be.").

[5] The Acting SG also asserts that *Richmark*'s foreign-law analysis was "dicta," because the Ninth Circuit ultimately upheld the discovery

Riggs I, the Acting SG dismissively characterizes it as "clearly distinguishable" because it "involved the act of state doctrine" and, according to him, the Eleventh Circuit's decision does not "call into question any 'act of state.'" Opp. 21.

That assertion, however, overlooks the fact that the views the Republic has presented are binding law in Honduras. For example, the Agriculture Ministry's adoption of the Human Rights Commissioner's legal conclusions has a substantive impact in Honduras (Br. for Honduras 16)—making it exactly analogous to the Finance Minister's order in *Riggs I*—yet the court below and the Acting SG both assert that the Minister's order is incorrect as a matter of Honduran law. Likewise, the interpretive decree passed by the Honduran Congress is binding throughout Honduras. Nonetheless, the Acting SG characterizes it as a legally erroneous construction of that Nation's Civil Code, just as the court below declared itself "unconvinced" by the decree based on its *own* reading of the Civil Code and of what the Congress had "intended" by the 1995 repealer statute. Pet. App. 30a-31a & n.34. Because the court below and the Acting SG both premise their analyses on the notion that Honduras has misconstrued its own law and thus is misapplying it to Honduran citizens, both the decision below and the government's defense of it conflict with the act-of-state doctrine under *Riggs I*. *See W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 405, 409 (1990).[6]

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request despite the contrary requirements of Chinese law. Opp. 22. But that is clearly wrong: a statement is dictum if it is *unnecessary* to the decision. In *Richmark* the court was required to balance other interests against the foreign law it determined was at issue. *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 nn.28-29 (1987). That the foreign law did not carry the day does not mean that the Ninth Circuit was not required to consider it.

[6] The Acting SG's attempted distinction of *Elmendorf*, and the Federal Circuit's case law following it, posits that *Elmendorf* involves deference to foreign *courts* (Opp. 20 n.12), but that assertion misses the point: in Honduras's civil law system, the Congress and the Attorney General

3. Although the Acting SG concedes that foreign law is "regularly implicated in domestic litigation," he contends that review is not warranted because the application of deference principles to such cases likely will be factbound. Opp. 24-25. But that contention relies on the unwarranted assertion that all such cases are governed by amorphous *Skidmore* principles. Even were the latter view correct, review would still be required to correct the Eleventh Circuit's legal error in failing to defer—indeed, the government has sought review, and summary reversal, in such circumstances.[7] And where, as here, the courts of appeals are divided over the correct *mode* of analysis, the Acting SG's bare assertion that such analysis is fact-intensive in *application* assuredly cannot carry the day.[8]

III. The Eleventh Circuit's "Finality" Rule Violates Established Due Process Principles

The Acting SG does not dispute that the due process question presented by this case—whether a criminal defendant

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enjoy interpretive authority comparable to that of the highest court in a common law system.

[7] *See, e.g.*, Petition For A Writ Of Certiorari, *United States v. Mead Corp.*, No. 99-1434, at 22; Reply Brief For The United States, *United States v. Mead Corp.*, No. 99-1434, at 4.

[8] Citing *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Acting SG also contends that the situation presented by this case is "rarely encountered." Opp. 23, 24. But *Jota* has nothing to do with this case. The issue there was whether litigation to which Ecuador might be an "indispensable party" could proceed over Ecuador's objection, which raised comity and sovereign-immunity questions. The "changed litigating position" that worried the court occurred when Ecuador, after the case was dismissed, abandoned its objections and sought to intervene as a party defendant. 157 F.3d at 160. It may indeed be "rare" for a party who successfully sought dismissal to change course after judgment and insist on becoming a defendant, but that is very far afield from this case. Indeed, even in that situation, the Second Circuit left open the possibility that the intervention would be granted, by analogy to this Court's practice of accepting the SG's confessions of error. *Id.* at 161 & n.7; Pet. 26 & n.14.

who is exonerated by a subsequent construction of the statute of conviction must be given the benefit of any such construction, notwithstanding any supposed interest in finality—meets the criteria for certiorari. Nor could he: This Court has already recognized in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam), and *Bunkley v. Florida*, 123 S. Ct. 2020 (2003) (per curiam), that this question is one of compelling importance. The Acting SG resists review on this question *only* by asserting that no retroactivity consideration is presented in this case.

The Acting SG, however, is simply attempting to have it both ways. He and the court below both aver that the Republic's view should be disregarded *because* Honduran law has been changed or clarified. But due process would still require application of any such "change" or "clarification" here, despite the Eleventh Circuit's novel "finality" rule, because petitioner's conviction remains pending on direct review. Pet. 28-29. Faced with that realization, the Acting SG now contends—contrary to what the government argued below—that the retroactivity question is governed solely by Honduran law. Opp. 27.[9] As Honduras has again explained, however, any legal changes that favor criminal defendants *are* retroactive under Honduran law. Br. for Honduras 11 n.11. And even if that were not true, the Acting SG has not explained why petitioner—who was indicted and tried by our government in our courts—is not entitled to the same due process rules that this Court applies to every other criminal defendant.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[9] .The United States asserted below that "the United States' retroactivity provisions apply." *E.g.*, U.S. C.A.11 Br. (Nos. 02-10810-JJ & 02-11264-JJ), at 44; *see* U.S. Response, S.D. Ala. Dkt. # 387, at 14 n.5.

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